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No. 97-759

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

JAMES W. CILECEK, M.D.,
Petitioner,

v.

INOVA HEALTH SYSTEM SERVICES, JOAN MILES, R.N., EMERGENCY PHYSICIANS OF NORTHERN VIRGINIA, LTD. and THOM A. MAYER, M.D.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN ACADEMY OF EMERGENCY MEDICINE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

GASPARE J. BONO
Counsel of Record
MARK H. TIDMAN
BAKER & HOSTETLER, LLP
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, DC 20036
(202) 861-1500

Counsel for Amicus Curiae American Academy of Emergency Medicine

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QUESTION PRESENTED

Did the Fourth Circuit err in usurping the province of the jury by holding that an emergency room doctor was an "independent contractor" not protected by Title VII (1) in the face of evidence that the hospital exercised control over his activities identical to the control exercised over physicians that were called "employees" and (2) contrary to the law established by this Court and other Circuits?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

INTRODUCTION AND SUMMARY OF ARGUMENT . 11

I. THE FOURTH CIRCUIT DECISION IS DIRECTLY CONTRARY TO THIS COURT'S RULE REJECTING MERE LABELS AS DETERMINATIVE OF EMPLOYMENT STATUS, AND GIVES RISE TO DISPARITY AMONG THE CIRCUITS ON THIS ISSUE 12

A. The Fourth Circuit's Failure to Follow the Well-Settled Standard for Construing the Term "Employee" Under Federal Statutes 12

B. The Fourth Circuit's Failure to Weigh All Relevant Factors and Impingement Upon the Role of the Jury 16

II. THE FOURTH CIRCUIT DECISION CREATES A DISPARITY IN TITLE VII PROTECTION IN THE VARIOUS CIRCUITS, SINCE THE FOURTH CIRCUIT'S DECISION DEPRIVES CERTAIN EMERGENCY ROOM DOCTORS, AND POSSIBLY OTHER PROFESSIONALS, OF TITLE VII PROTECTION 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) . 15

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1968) . 17

Brock v. Superior Care, Inc., 840 F.2d 1054 (2d Cir. 1988) 14

Community for Creative Non-violence v. Reid, 490 U.S. 730 (1989) 13

Daughtrey v. Honeywell, Inc., 3 F.3d 1488 (11th Cir. 1993) 14, 18

Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78 (8th Cir. 1996) 14

Eastern Inv. Corp. v. United States, 49 F.3d 651 (10th Cir. 1995) 15

EEOC v. First Catholic Slovak Ladies Ass'n, 694 F.2d 1068 (6th Cir. 1982) 15

Folkerson v. Circus Circus Enters., No. 93-1758 1995 U.S. App. LEXIS 30137 (9th Cir. Oct. 16, 1995) . 18

Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A., 104 F.3d 1256 (11th Cir. 1997) 13, 15, 17

Gonzalez v. Trinity Marine Group, Inc., 117 F.3d 894 (5th Cir. 1997) 17

Mallare v. Saint Luke's Hosp., 699 F. Supp. 1127 (E.D. Pa. 1988) 17

Mukhtar v. Castleton Service Corp., 920 F. Supp. 934 (S.D. Ind. 1996) 15

Table of Authorities (continued)

Page

Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992) 11, 12, 13, 15

Rutherford Food Corp. v. McComb, 331 U.S. 722 (1946) 11, 12, 14

Sharkey v. Ultramar Energy, 70 F.3d 226 (2d Cir. 1995) 14, 17

Vanskike v. Peters, 974 F.2d 806 (7th Cir. 1992) 14

Vizcaino v. Microsoft Corp., 120 F.3d 1006 (9th Cir. 1997) 13, 14, 15

STATUTES

Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201, *et seq.* 12

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae, American Academy of Emergency Medicine ("AAEM"), is a non-profit organization representing

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[1] Petitioner and respondents have consented to the filing of this amicus brief. Their letters of consent are being lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, Amicus Curiae hereby submits that its counsel authored the present brief and that no party other than Amicus Curiae made any monetary contribution to the preparation or submission of this brief.

emergency room physicians. The organization is committed to the unencumbered access to quality emergency care; the specialized practice of emergency medicine; the growth of residency programs and medical education to ensure high quality patient care, the personal and professional welfare of individual specialists in emergency care medicine; and fair and equitable practice environments necessary to allow emergency medical specialists to deliver the highest quality patient care. AAEM submits this brief to supplement the arguments made by petitioner, Dr. Cilecek, who is one of the Academy's members, on the issue presented that is of particular concern to AAEM and its members: Whether emergency room doctors should be deprived of Title VII protection in the Fourth Circuit solely because they are "independent contractors" for tax purposes, notwithstanding the workplace realities, and the fact that many such independent contractors perform the same functions, are subject to the same controls, and have the same duties and obligations as doctors labeled "employees". This case is important to AAEM because the Court of Appeals decision threatens the vital Title VII rights of its membership in the Fourth Circuit.

STATEMENT OF THE CASE

1. Dr. Cilecek is a Board-certified emergency medicine physician with almost fifteen years experience practicing medicine. Dr. Cilecek was hired in 1984 by the Emergency Department of Commonwealth Hospital, which was one of many hospitals in the northern Virginia region owned by respondent Inova (under its former name, Fairfax Hospital System). At that time, Commonwealth Hospital and Inova had a contract with a medical group called Commonwealth Medical Services to provide physician staffing for the emergency department. Dr. Cilecek was employed by

Commonwealth Medical Services, but had no written employment contract.

2. In or around 1985, Inova built a new hospital, Fair Oaks Hospital, and Dr. Cilecek began working at the Fair Oaks Emergency Department with Commonwealth Medical Services. In the fall of 1987, Dr. Cilecek transitioned to the emergency departments of two other Inova facilities, Fairfax Hospital, and its affiliate Access of Reston, a free-standing emergency facility. In June 1988, Fair Oaks Hospital ended its relationship with Commonwealth Medical Services, but Dr. Cilecek was asked to continue working at Fairfax Hospital and Access of Reston. In the spring of 1989, Inova signed an exclusive contract with Emergency Physicians of Northern Virginia, Ltd. ("EPNV") for EPNV to provide all emergency department physicians for Fairfax Hospital and Access of Reston, while nurses, other personnel, and day-to-day administration and business for the hospital would be provided by Inova. At that time, Dr. Thom Mayer, the president of EPNV and new head of the Emergency Department at Fairfax Hospital and Access of Reston, asked Dr. Cilecek to work for EPNV at those facilities. Dr. Cilecek agreed, and was not required by EPNV or Inova to sign a contract as a condition of his employment. While Dr. Cilecek was told by EPNV during his employment with them that his status was that of an "independent contractor," as explained below, for Title VII purposes Dr. Cilecek was an employee of EPNV. Although neither Dr. Cilecek nor any other emergency physicians were provided with the terms of EPNV's agreement with Inova, Dr. Cilecek was told that he was required to report to Dr. Mayer and to an Inova hospital administrator. Approximately one year later, in April 1990, Dr. Mayer asked Dr. Cilecek to sign an independent contractor agreement, but he did not require that Dr. Cilecek

do so, nor did he terminate or otherwise take action against Dr. Cilecek when he did not sign the agreement.

3. In August 1991, Dr. Cilecek approached Dr. Mayer regarding the possibility of Dr. Cilecek accepting a part-time position at a new free-standing emergency facility in North Stafford, Virginia which was part of Mary Washington Hospital ("MWH"). Dr. Mayer approved of this proposal because he thought that the new MWH facility might provide additional patients to Inova AirCare, a helicopter transport program which was headed by Dr. Mayer and was an integral part of the Inova system. In late August 1991, Dr. Cilecek began working part-time at MWH while he continued to work part-time for EPNV and Inova at Fairfax Hospital. However, fourteen months later in October 1992, Dr. Mayer offered Dr. Cilecek more money to return full-time to EPNV, and Dr. Cilecek accepted. Dr. Cilecek returned to a full-time position at Fairfax Hospital Emergency Department and Access of Reston, both Inova facilities, in January 1993, working in excess of 100 hours per month at those facilities until his termination in October 1994. Aside from his part-time work at MWH, Dr. Cilecek never had a medical practice apart from his practice at Inova facilities while he was employed by EPNV. While some doctors simply have "staff privileges" at Inova hospital facilities, which allow them to admit patients who come to them at their individual medical practices, Dr. Cilecek had no such separate practice, and depended entirely on his work at the Inova facility for his income and medical practice.

4. In late 1993, Dr. Cilecek approached Dr. Mayer several times regarding Dr. Cilecek's concerns about unsafe Emergency Department practices at Access of Reston, where he was then working full-time. For instance, Dr. Cilecek told Dr. Mayer that he believed that some of the nurses and

medical technicians hired by Access and/or Inova were not adequately trained for emergency care and were a hazard to the well-being of patients. Dr. Cilecek also told Dr. Mayer that he believed there was a dangerous lack of maintenance of the oxygen systems and the Inova helicopter facilities at Access of Reston. In addition to Dr. Mayer, Dr. Cilecek discussed his concerns with Joan Miles, the Inova Administrator of Access of Reston; Steve Brown, the Inova Administrator of Fair Oaks Hospital, who was Joan Miles' superior; and other Inova and EPNV personnel. In response to these discussions, Dr. Mayer called Dr. Cilecek to his office in December 1993, reprimanded him and threatened him with termination. Dr. Cilecek was prohibited by Dr. Mayer from discussing any of his concerns or criticisms about the Inova/EPNV facilities with anyone except Dr. Mayer or Dr. Cates (Vice-Chairman of the Emergency Department of Fairfax Hospital), under penalty of termination.

5. In or around January 1994, Dr. Cilecek requested a written contract of employment, and Dr. Mayer agreed to execute a contract as long as certain provisions were included to prohibit Dr. Cilecek from speaking to others about conditions in the Emergency Department. In April 1994, Dr. Mayer presented to Dr. Cilecek a contract which prohibited Dr. Cilecek from criticizing Access of Reston or EPNV either overtly or covertly, and from discussing "criticisms of the leadership or management, whether physician or non-physician in nature,...with either the staff, patients, medical staff, or senior management of Inova." *Only Dr. Cilecek* was asked to sign such an agreement; no other

physician or medical staff at Access of Reston or Fairfax Hospital were requested to do so.[2]

Dr. Cilecek believed that the contract Dr. Mayer presented him was illegal because it infringed on his First Amendment rights. He told Dr. Mayer that he still wanted to sign a contract but was not comfortable with the portions of the contract restricting his free speech rights. Dr. Cilecek asked if the portions of the contract dealing with speech could be excised, but Dr. Mayer did not respond and did not raise the issue of the contract again.

6. In July 1994, Dr. Cilecek was asked by an attorney for Virginia Lowe, a former employee of Inova at the Access of Reston facility who was suing Inova for sexual harassment, to sign an affidavit in support of Ms. Lowe's case regarding sexual harassment at the Access facility against Inova nurses and employees. Dr. Cilecek signed such an affidavit on July 7, 1994.

7. On July 13, 1994, Steve Brown, the Inova Administrator of Fair Oaks Hospital, sent a memorandum to management at Fair Oaks Hospital, which was distributed at Access of Reston as well, ordering that no employees of either Fair Oaks or Access could discuss with former employees any personnel policies or other information that might support the former employees' lawsuits or administrative actions against Inova. The memo also directed employees to contact Inova's Human Resources Office if any former employees contact them or their staff.

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[2] For instance, Dr. Robert Cates, Dr. Kathleen Kelly and other emergency physicians at Fairfax Hospital and Access of Reston were not required to sign contracts prohibiting or restricting their free speech rights.

8. In late July 1994, Dr. Cilecek received a subpoena requiring him, under penalty of arrest, to give a deposition in Ms. Lowe's sexual harassment lawsuit against Inova. Around this time, Dr. Cilecek was called by Joan Miles, Inova's Administrator of Access of Reston, who strongly implied to Dr. Cilecek that if he gave testimony favorable to Virginia Lowe or unfavorable to Inova (such as the testimony in his affidavit), another witness in the case might say disparaging things about him that could lead to trouble for him. This veiled threat, intended to intimidate Dr. Cilecek, turned out to be untrue and unfounded.

Before appearing for his deposition on August 23, Dr. Cilecek submitted his schedule request for September and October to Kaye Wear (an EPNV employee at Fairfax Hospital), as he did each month. Because he was planning a vacation, Dr. Cilecek requested that instead of his regular 100+ hours per month (approximately 10-12 shifts), he be scheduled for 5-6 shifts (50-60 hours) in September and 6-8 shifts (60-80 hours) in October. However, on August 22, 1994, *the day before his scheduled deposition in the sexual harassment lawsuit against Inova and only a few weeks after Ms. Miles' veiled threats*, Dr. Cilecek was given a draft schedule for September and October which gave Dr. Cilecek 5 shifts in September, as he requested, but only 2 shifts in October (as opposed to the 6-8 he had requested). It appeared to Dr. Cilecek that he was being warned by EPNV and Inova that his employment was in danger if his deposition testimony the next day was in any way detrimental to Inova or EPNV.

9. The next day, August 23, Dr. Cilecek appeared under subpoena for his deposition in the sexual harassment case against Inova. Dr. Cilecek testified truthfully that the plaintiff, Virginia Lowe, on numerous occasions had complained to him, as a senior physician at Access of Reston,

about the sexually explicit behavior of a certain Inova employee toward her, and that Ms. Lowe's complaints to Inova administrators about this behavior had gone unheeded. Dr. Cilecek also testified that nurses employed by Inova at the Access of Reston facility had also complained to him about sexually inappropriate behavior of other Inova physicians and employees against them. When asked under oath about his opinion of Inova's administration of the Fairfax Hospital and Access of Reston, Dr. Cilecek replied truthfully that he thought that the Inova administrator at Access of Reston, Joan Miles, was not a competent manager and that he believed that Access had patient care and safety problems. Under further questioning at his deposition, Dr. Cilecek stated truthfully that he had complained to EPNV and Inova about his concerns over Access' problems.

10. Dr. Mayer received a copy of Dr. Cilecek's deposition transcript soon after August 23.[3] Almost immediately, Inova and EPNV retaliated against Dr. Cilecek for his testimony in the sexual harassment case, which Inova ultimately settled with Ms. Lowe. When Dr. Cilecek wrote Dr. Mayer on August 29, protesting the drastic cut in his scheduled hours for September and October and asking that it be corrected, Dr. Mayer ignored Dr. Cilecek altogether and took no action to correct the schedule. On September 27, 1994, Dr. Cilecek wrote Dr. Mayer again, asking that he review the schedule and noting that Dr. Cilecek had submitted his schedule request for full-time (10-12) shifts for November and December 1994.

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[3] Dr. Cilecek had been told by an Inova employee, Judy Gobi, that Joan Miles showed a copy of Dr. Cilecek's deposition to Dr. Mayer and told him that she wanted to get rid of Dr. Cilecek because of his "devastating" testimony against Inova.

11. Dr. Mayer responded on October 5, 1994 *on Inova letterhead*, stating that "it is in the best interest of both parties that your working relationship with EPNV terminate" effective November 1, 1994. Dr. Cilecek had received no warning of this termination and Dr. Mayer gave no reason for terminating Dr. Cilecek, instead simply noting that Dr. Cilecek had never signed a contract with EPNV. Dr. Mayer asked that Dr. Cilecek accept the terms set forth in this letter as "full settlement and satisfaction of any [and] all claims and rights against EPNV, its officers, agents, and employees, and otherwise, arising in any way from your relationship with EPNV and your waiver and release of same...." and signify such acceptance with his signature on the letter. It is important to note that prior to this time, Dr. Cilecek had never been reprimanded, suspended or otherwise disciplined by Dr. Mayer, EPNV or Inova, except for the single incident in 1993 regarding his voicing concerns over patient care. His record of performance as an emergency physician was otherwise spotless.

Dr. Cilecek responded to Dr. Mayer's termination letter on October 24, 1994, stating that the termination constituted unlawful retaliation for his deposition testimony in the *Lowe v. Inova* sexual harassment case and that he wished to remain employed by EPNV. Dr. Cilecek also noted that "it is common knowledge that a number of physicians in our group do not have contracts [n]or has there been any requirement for physicians to sign a contract," and that the contract Dr. Mayer had presented to Dr. Cilecek in April 1994 had infringed on his free speech rights. Dr. Cilecek refused to sign the termination letter as Dr. Mayer requested. On October 31, 1994, Dr. Mayer wrote Dr. Cilecek, stating that his continued work with EPNV was "not an option at this time."

12. Dr. Cilecek filed suit against the hospital and EPNV in the United States District Court for the Eastern District of Virginia on October 12, 1995, alleging wrongful retaliatory discharge and violation of Title VII. The Defendants moved for summary judgment which was granted without permitting Dr. Cilecek any discovery, the Court ruling that Dr. Cilecek was an "independent contractor" and therefore not protected by Title VII. The District Court relied primarily on the fact that the parties referred to Dr. Cilecek as an "independent contractor," and that he was treated as such for tax purposes.

13. The divided panel of the United States Court of Appeals for the Fourth Circuit affirmed the District Court's holding. In its opinion, the Court focused primarily on EPNV's agreement that Dr. Cilecek would be an "independent contractor." The Fourth Circuit virtually ignored the overwhelming other factors pointing to a determination that Dr. Cilecek was an "employee" for Title VII purposes. In doing so, the Fourth Circuit failed to follow the well-established principle that a determination of whether an individual is an "independent contractor" or an "employee" for such purposes turns primarily on the degree of control exercised by the hiring party, a factor strongly in favor of finding that Dr. Cilecek was entitled to Title VII protection in this case.

Judge Murnaghan dissented, protesting that the governing legal standard dictates that the agreement of the parties "cannot overcome the actual facts" which were that Dr. Cilecek worked essentially full time, at a set hourly rate, and that EPNV would pay him and supply his malpractice insurance. In reviewing the factors identified by this Court and other courts as determinative of the employment

relationship, Judge Murnaghan concluded that "[a] majority of those factors points to Dr. Cilecek as an employee."

14. Dr. Cilecek petitioned for a rehearing en banc on June 14, 1997. On August 5, 1997, the Fourth Circuit denied the petition. The United States and the Equal Employment Opportunity Commission as amicus curiae supported Dr. Cilecek's position both on appeal and on rehearing, arguing that the panel's creation of a new Title VII exclusion in the medical context would improperly narrow the reach of Title VII, and "frustrate (Congress') remedial purpose in enacting Title VII to protect workers from discrimination."

INTRODUCTION AND SUMMARY OF ARGUMENT

In its erroneous holding, the Fourth Circuit relied primarily on the agreement between the parties that Dr. Cilecek would be called an "independent contractor" for tax purposes. The Fourth Circuit ignored this Court's rulings in *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) and *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), articulating the test for construing whether or not a person in an employment context is entitled to protection for federal and remedial statute purposes. In those cases, this Court required that consideration must be given to the hiring party's right to control the manner and means of the work, and made it clear that the mere use of an "independent contractor" label does not deprive the worker of protection under Title VII.

In its fact intensive decision upholding the District Court's grant of summary judgment without submitting the evidence to a jury, the Fourth Circuit likewise created a direct conflict with recent decisions of the Ninth and Eleventh Circuits which held that a contractual arrangement structured to avoid creating an employment relationship does not

overcome the realities of the workplace. The result of this holding is that certain doctors (and possibly other professionals) are deprived of Title VII protection in the Fourth Circuit merely because they are "independent contractors" for tax purposes, regardless of the fact that they perform the same functions, are subject to the same controls, and have the same duties and obligations as doctors who are "employees" for tax purposes. This is a fundamentally unfair result that runs contrary to the holdings of this Court and other Circuits and undermines the intent of Title VII.

I. THE FOURTH CIRCUIT DECISION IS DIRECTLY CONTRARY TO THIS COURT'S RULE REJECTING MERE LABELS AS DETERMINATIVE OF EMPLOYMENT STATUS, AND GIVES RISE TO DISPARITY AMONG THE CIRCUITS ON THIS ISSUE

A. The Fourth Circuit's Failure to Follow the Well-Settled Standard for Construing the Term "Employee" Under Federal Statutes

Under Title VII, and a variety of other federal statutes, who is an "employee" is not determined by the labeling of that person, but rather by what work is done and how it is controlled. It is not possible to circumvent the obligations an employer has to an employee by the mere labeling of that individual as an "independent contractor." *Rutherford Food Corp. v. McComb*, 331 U.S. at 729 (In interpreting the term "employee" under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201, *et seq.*, this Court stated that "[w]here the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act."). This Court most recently again construed the meaning of the term "employee" under ERISA. In *Darden*, this Court held that

where a federal statute does not define the term "employee," as in the circular definition provided in Title VII, the Court should presume the term to incorporate traditional common law principals of agency, under which control is the key factor. *Id.* at 323 ("'In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished.'" (*quoting Community for Creative Non-violence v. Reid*, 490 U.S. 730, 751 (1989))). This well-settled principal has been followed by the Ninth and Eleventh Circuits in *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997) and *Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A.*, 104 F.3d 1256 (11th Cir. 1997). The *Garcia* case construed the term "employee" under the Age Discrimination and Employment Act, and explicitly provided that the doctor was to perform his duties "as *an independent contractor and not as an employee*" and that nothing in the contract should "be construed to create" any "relationship between the parties *other than an independent contractor relationship.*" *Garcia*, 104 F.3d at 1258 (emphasis in original). Under the contract, the corporate provider was to exercise no control over the means or manner in which the doctor performed his duties. *Id.* Notwithstanding this very explicit agreement between the parties, the Eleventh Circuit found that the contract did not deprive the "independent contractor" of federal statutory protection. *Id.*

Likewise, in *Vizcaino*, *supra*, the Ninth Circuit construed the term "employee" under the Employment Retirement Security Act of 1974. In *Vizcaino*, the Ninth Circuit found Microsoft workers to be covered by the Act, notwithstanding contracts designating them as "independent contractors" with an explicit intention not to create an employment relationship, and the fact that the Microsoft

workers were responsible for their own taxes and benefits. *Id.* at 1008-12. In making this determination, the Ninth Circuit considered how the workers were actually treated, finding them to be treated in reality like employees having been "fully integrated" into the employment work force. *Id.* at 1008.

That a determination of whether or not a worker is a "employee" or an "independent contractor" should turn on the work place realities, and not mere labeling, is widely recognized by this Court and the Courts of Appeals. *See Rutherford Food Corp. v. McComb*, 331 U.S. at 729 ("[W]here the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the [Fair Labor Standards] Act."); *Sharkey v. Ultramar Energy Ltd.*, 70 F.3d 226, 232 (2d Cir. 1995) ("The employment status of an individual for the purposes of ERISA is not determined solely by the label used in the contract between the parties."); *Vanskike v. Peters*, 974 F.2d 806, 808 (7th Cir. 1992) (status of "employee" under FLSA depends on totality of circumstances "rather than on any technical label"), *cert. denied*, 507 U.S. 928 (1993); *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78, 81 (8th Cir. 1996) ("The actual duties and role of the individual govern [whether an individual is an "employee" under Title VII]. An employer may not avoid Title VII by affixing a label to a person that does not capture the substance of the employment relationship."), *cert. denied*, 117 S. Ct. 1694 (1997); *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1492 (11th Cir. 1993) ("The employment status of an individual for the purposes of ERISA is not determined by the label used in the contract between the parties"); *see also Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988) ("An employer's self-serving label of workers as independent

contractors is not controlling . . ."); *EEOC v. First Catholic Slovak Ladies Ass'n*, 694 F.2d 1068, 1070 (6th Cir. 1982) ("A determination of whether an individual is an employee and therefore covered by the protections in ADEA should not center on the label which the organization has chosen to give to the position"), *cert. denied*, 464 U.S. 819 (1983); *see also Eastern Inv. Corp. v. United States*, 49 F.3d 651, 655 (10th Cir. 1995) ("[T]he law is clear that Lowen's classification of a salesperson as employee or independent contractor is of no consequence....").

Further, this Court has held that a party cannot even waive the protection of a federal remedial statute by his or her agreement to be called an "independent contractor." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974) (an employee's rights under Title VII may not be waived prospectively); *Vizcaino*, *supra*; *see also Mukhtar v. Castleton Service Corp.* 920 F. Supp. 934, 938 (S.D. Ind. 1996) ("parties cannot agree to waive otherwise applicable protection provided by acts of Congress....[E]ven though the parties may have labelled their relationship in one way, their labels do not control if enough of the indicia of an employment relationship are present.") (citation omitted).

Thus, the Fourth Circuit's ruling is directly contrary to the authority of this Court and is in conflict with the authority in other Circuits. The Fourth Circuit improperly emphasized EPNV's labeling of Dr. Cilecek as an independent contractor, effectively ignoring the other factors that this Court has established are relevant to the employment relationship question. The Fourth Circuit's decision is also in conflict with the *Vizcaino* and *Garcia* cases in which the Ninth and Eleventh Circuits held that the labeling of a worker is not determinative, but rather the actual workplace realities must be considered. This Court should grant the petition for a *writ*

of certiorari to resolve this conflict among the Circuits created by the Fourth Circuit's erroneous decision.

B. The Fourth Circuit's Failure to Weigh All Relevant Factors and Impingement Upon the Role of the Jury

In *Darden*, *supra*, this Court set forth the following factors in determining who qualifies as a "employee" entitled to federal statutory protection: (1) the hiring party's right to control the manner and means of the worker's performance (the most important factor); (2) the skill required in the particular occupations; (3) the source of instrumentalities and tools; (4) the location of the work; (5) the duration of the relationship between the parties; (6) whether the hiring party has the right to assign additional projects to a hired party; (7) the extent of the hired party's discretion over when and how long to work; (8) the method of payment; (9) the hired party's role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provision of employee benefits; and (13) the tax treatment of the hired party. *Id.* at 323-24. But for the tax treatment of Dr. Cilecek, all of these factors favor a finding that Dr. Cilecek was entitled to protection under Title VII. All emergency room doctors have the same skills and do the same work; all work is done in the hospital, during the hospital's regular business, with the hospital's tools, equipment, personnel and patients; there was a relationship between the parties of ten years duration; Dr. Cilecek was paid by the hour, not by the job; and he received malpractice insurance from EPNV. Dr. Cilecek could not work when and as he pleased, but rather had to work at least 100, and up to 180 hours per month, depending on the hospital's needs. There is

no justification for the Fourth Circuit's failure to consider all of these factors.

Additionally, in its determination, the Fourth Circuit resolved disputed factual issues against Dr. Cilecek, ignoring the well-established principal that all permissible inferences must be weighed in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The Fourth Circuit made this fact intensive determination, rather than allowing this factual analysis to be made by a jury. It did this despite the fact that federal courts generally recognize the weighing of these many factual considerations make such a determination inappropriate for summary judgment. *See Garcia v. Copenhaver, Bell & Assoc.*, *supra*. (reversing the district court's decision to dismiss plaintiff's complaint for lack of subject matter jurisdiction where the facts concerning whether or not defendant was an "employer" was an element of plaintiff's ADEA claim and there were disputed facts about whether plaintiff was an "employee" of defendant). Indeed, in his dissent, Judge Murnaghan observed that the majority "resolve[d] disputed factual issues" against Dr. Cilecek, making summary judgment "inappropriate and ill advised." *See also Mallare v. Saint Luke's Hosp.*, 699 F. Supp. 1127 (E.D. Pa. 1988) (whether doctor in medical residency program was an employee of the hospital was not a matter for summary judgment where there were facts that both supported and weighed against finding an employment relationship); *Sharkey v. Ultramar Energy*, *supra* (court reversed district court's decision to grant defendant's motions of summary judgment where employment status of individual for purposes of ERISA is fact intensive inquiry, not determined solely by label used in contract and could not be properly determined on summary judgment); *Gonzalez v. Trinity Marine Group, Inc.*, 117 F.3d 894, 899 (5th Cir. 1997) (in denying plaintiff's motion for summary judgment on issue of whether plaintiff

was "employee" within the meaning of Title VII, district court explained that the determination "'requires a factual analysis of often conflicting allegations'" and therefore the "issue is not amenable to summary judgment at this time'"(citation omitted)); *Folkerson v. Circus Circus Enters.*, No. 93-1758, 1995 U.S. App. LEXIS 30137 (9th Cir. Oct. 16, 1995) (district court improperly granted summary judgment for defendant on plaintiff's Title VII claim on grounds plaintiff was independent contractor where evidence indicated defendant exercised control over plaintiff's work); *Daughtrey v. Honeywell, Inc.*, 3 F.3d at 1493 (reversed district court decision to grant summary judgment for defendants on plaintiff's ERISA claim where facts were disputed on pivotal issue of degree of control exercised by Honeywelll over plaintiff).

II. THE FOURTH CIRCUIT DECISION CREATES A DISPARITY IN TITLE VII PROTECTION IN THE VARIOUS CIRCUITS, SINCE THE FOURTH CIRCUIT'S DECISION DEPRIVES CERTAIN EMERGENCY ROOM DOCTORS, AND POSSIBLY OTHER PROFESSIONALS, OF TITLE VII PROTECTION

As a result of its decision, the Fourth Circuit has articulated a new rule for determining whether Title VII provides protection in the case of doctors, and perhaps other professionals. The Fourth Circuit has now held that, in that Circuit, the label attached to a worker for tax purposes, either contractually or otherwise, is the most relevant factor, not the workplace realities. This decision has created a circumstance under which hospitals and other health care facilities in the Fourth Circuit can circumvent Title VII requirements and other statutes by labeling its workers "independent contractors" for tax and other business purposes. The result

of this holding is that emergency room doctors (and possibly other professionals) are deprived of Title VII protection in the Fourth Circuit by the mere labeling of them as "independent contractors" for tax purposes notwithstanding that they perform the same functions, are subject to the same controls, and have the same duties and obligations as other emergency room doctors. This is a fundamentally unfair result that runs contrary to the holdings of this Court and other Circuits, and undermines the remedial purpose and intent of Title VII. There is no legal authority offered by the Fourth Circuit, or other compelling policy reason, for this radical departure from the previous decisions of this Court and other Circuits. The Court of Appeals' decision creates a wide disparity between the Title VII protection afforded emergency room doctors in the Fourth Circuit, and the protection afforded other emergency room doctors in other Circuits. Indeed, emergency room doctors working side by side, performing the same work in the same hospitals within the Fourth Circuit, are to be treated differently under Title VII under the Court of Appeals' decision. It is respectfully submitted that this Court should grant the Petition for Writ of Certiorari to address the clear deprivation of Title VII protection afforded emergency room doctors in the Fourth Circuit.

CONCLUSION

Based on the foregoing, Amicus Curiae, American Academy of Emergency Medicine, hereby respectfully submits that this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

GASPARE J. BONO
Counsel of Record
MARK H. TIDMAN
BAKER & HOSTETLER, LLP
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, DC 20036
(202) 861-1500

Counsel for Amicus Curiae
American Academy of
Emergency Medicine

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